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No. 153

Supreme Court of the United States.

OCTOBER TERM, 1940.

JOHN J. CHICKERING, ADMINISTRATOR,
Petitioner for Certiorari,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

AND

BRIEF IN SUPPORT THEREOF.

FREDERICK H. NASH,
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CHOATE, HALL & STEWART,
Of Counsel.

INDEX.

	Page
Petition	1
Opinions below	1
Jurisdiction	2
Questions presented	2
The statute involved	3
Statement	4
Specification of errors	5
Reasons for granting the writ	6
Brief	9
I. The decision cannot be reconciled with Helvering v. Helmholz	9
II. The Circuit Court of Appeals failed to apply the correct criteria with reference to the retroactive feature of the tax	13
Conclusion	19

TABLE OF AUTHORITIES CITED.

Commissioner v. Chase National Bank, 82 F. (2d) 157, cert. denied, 299 U.S. 552	13, 17
Donne's Trusts, In re, L.R. 1 Ir. 516	18
Helvering v. Grinnell, 294 U.S. 153	15
Helvering v. Helmholz, 296 U.S. 93	9, 10, 11, 13, 15, 16
Helvering v. Helmholz, 28 B.T.A. 165	10
Hoblitzelle v. United States, 3 F. Supp. 331	12
Holderness v. Commissioner, 86 F. (2d) 137	13
Porter v. Commissioner, 60 F. (2d) 673	17
United States v. Jacobs, 306 U.S. 363	17, 18
White v. Poor, 296 U.S. 98	15
Witherbee v. Commissioner, 70 F. (2d) 696	17

	Page
Revenue Act of 1926	
Section 302(a)	14
Section 302(b)	14
Section 302(c)	14, 15
Section 302(d)	11, 12, 14, 15, 16, 19
Section 302(e)	14, 17
Section 302(f)	15
Section 302(g)	15
United States Constitution, Fifth Amendment	15, 17

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COMMISSIONER OF INTERNAL REVENUE,
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PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honorable the Justices of the Supreme Court of the United States:

The undersigned, on behalf of the above-named petitioner, prays that a writ of certiorari may issue to review the decree of the Circuit Court of Appeals for the First Circuit entered March 13, 1941, in the case between the above-named parties docketed therein as No. 3618.

Opinions Below.

The opinion of the Circuit Court of Appeals appears at pages 97 to 107 of the Record and has been printed in 118 F. (2d) 254. There is no official report of the

opinion of the Board of Tax Appeals. It appears in the Record, pages 82 to 87.

Jurisdiction.

The decree of the Circuit Court of Appeals was entered on March 13, 1941 (R. p. 107). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

The action to which this petition relates is a petition for review of a decision of the United States Board of Tax Appeals.

Questions Presented.

(1) Does Section 302 (d) of the Revenue Act of 1926 purport to lay an excise on anything other than a transfer by the decedent made before death?

(2) If not, does the fact that the decedent at death held a special power, narrowly circumscribed, by which she could merely deprive her issue of rights under a trust justify a tax under said Section 302 (d) upon property settled in trust in 1901?

(3) Where a decedent dying in 1935 had in 1901 accepted, in lieu of an inheritance not reduced to possession, a beneficial interest in a trust of her ancestor's property, which trust gave to her a special power to cut off a remainder interest therein in her issue, is the value of the expectancy to be included in the gross estate under said Section 302 (d) upon the footing that the 1901 transaction constituted a transfer by the decedent of property the enjoyment of which was at her death subject to change through her exercise of a power to alter, amend, or revoke?

(4) If the Act purports to impose an excise on this transfer, is its application under the facts herein forbidden by the Fifth Amendment?

The Statute Involved.

The pertinent provision of the Revenue Act of 1926, under which the case arises, was as follows:

> "Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> . . . . . .
>
> "(d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth;
>
> . . . . . .
>
> "(h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act."

Statement.

The facts are all stipulated. From them the following appears:

The petitioner's intestate (hereinafter called the decedent) died in 1935 leaving one son surviving her. Her father had died intestate in 1899 leaving his widow and five children as his heirs. In 1901, with the consent of the heirs, his personal estate which was then distributable to the heirs (but not distributed) was conveyed to trustees and the heirs conveyed to the trustees his real estate. Prior to these conveyances the decedent had an expectancy of 13 1/3 per cent of the estate. Under the trust to which the property was conveyed the decedent received and enjoyed a life estate in possession which at her death was in 21 per cent of the trust property. Upon her death this interest would pass to her son, subject, however, to a power in the decedent to cut him off. In the event of exercise of the power the estate thus "disappointed" would pass to the other beneficiaries pursuant to the provisions of the trust and not pursuant to any appointment. Each of the other four brothers and sisters took similar interests in the trust and had identical special powers over their interests. The powers consequently were strictly reciprocal and the exercise of any would redound to the benefit of each other donee-grantor or his heirs.

Upon the decedent's death the petitioner did not include any interest in the trust in the gross estate for purposes of the estate tax under the Revenue Act of 1926. The Commissioner assessed a deficiency on account of this property. This was reduced in part upon petition to the Board of Tax Appeals, but it was there determined that the petitioner should have included in the gross estate 13 1/3 per cent of the total 1935 value of

the trust property. This was upon the theory that the trust settlement of 1901 constituted, within the language of the Act, a transfer by the decedent of property, the enjoyment whereof was at her death in 1935 subject to change through the exercise of the power just mentioned as a power to alter, amend, or revoke. The deficiency amounted to $125,856.69. This decision was affirmed by the Circuit Court of Appeals for the First Circuit upon petition for review.

Specification of Errors.

1. The Court erred in deciding that 13 1/3 per cent of the corpus of the William A. Russell Trust was includable in the decedent's gross estate.

2. The Court erred in deciding that Mrs. Chickering's power to cut off her son, irrevocably established as one of the reciprocal conditions created by the mutual covenants in 1901, subjected the corpus to a retroactive tax under the Act of 1926 at its full value at her death in 1935.

3. The Court erred in deciding that an excise tax may be imposed upon property irrevocably transferred prior to the enactment of the taxing statute because subject to a special power in the transferor, although the power retained could not have been relinquished after the Revenue Act.

4. The Court erred in deciding that the decedent had a right without concurrence of substantially adverse interests to release her power.

5. The Court erred in deciding that the reciprocal powers were personal to the grantors as grantors and retained for their own benefit, while failing to decide

that those powers existed equally for the benefit of all of the other grantors as beneficiaries, and hence that the powers could not be changed or released without the consent of substantially adverse interests.

6. The Court erred in failing to observe that, although Mrs. Chickering should release her power to benefit the other grantors, nevertheless she must receive under the trust her share of whatever property the other grantors might cut away from their issue, thus modifying the trust and accomplishing a complete disruption of its purposes.

Reasons for Granting the Writ.

(1) The Circuit Court of Appeals in its decision refused to follow decisions of this Court, notably that in *Helvering* v. *Helmholz,* 296 U.S. 93. In its opinion the Circuit Court of Appeals referred to that case and likewise to *White* v. *Poor,* 296 U.S. 98, and sought to distinguish them by stating that in those cases

> "the taxpayers had retained powers, in trusts created prior to the enactment of the applicable section of the estate tax, which were exercisable only with the consent of persons adversely interested in such exercise. To tax on the basis of such a power would, the court held, be in effect retroactive, since the decedents had parted with all real control,"

whereas in the case at bar

> "Mrs. Chickering's power was not circumscribed by any requirement of concurrence in its exercise" (R. pp. 104, 105).

In the *Helmholz* case the decedent had a special power of appointment exercisable without the concurrence of any other person and consequently not to be distinguished from the power in the decedent in the case at bar.

(2) The Circuit Court of Appeals demonstrates in its opinion a confusion in the cases between the different bases for tax under the several clauses of Section 302 of the Revenue Act. By reason of this confusion there is danger of widespread misapplication of the criteria of decision, of which danger this case is an example, which merits authoritative determination by this Court.

The Circuit Court of Appeals considered the tax as an excise laid upon the retention at the date of death of a power of appointment measured by the value of the corpus subject to the power. This is apparent from the discussion of the opinion in *United States* v. *Jacobs*, 306 U.S. 363. (See R. p. 102.) From the language of the Act it is apparent that the excise is laid, not simply upon the existence of the power, but upon the transfer prior to death out of which the power had its rise. The evident theory of the statute is that it imposes a tax upon a transfer which is incomplete by reason of the retention of a power.

Due to this failure to apprehend the basis of taxation the Circuit Court of Appeals failed to apply the appropriate criterion to determine whether the tax was or was not retroactive and consequently within the denunciation of the Fifth Amendment.

(3) The opinion of the Circuit Court of Appeals directly conflicts with decisions of the Circuit Court of Appeals for the Second Circuit holding that a tax such as that here imposed avoids the objection of retro-

activity only where the power in question could have been freely relinquished between the enactment of the statute and the death. Those decisions are

Porter v. *Commissioner*, 60 F. (2d) 673.
Witherbee v. *Commissioner*, 70 F. (2d) 696.
Commissioner v. *Chase National Bank*, 82 F. (2d) 157.

The Circuit Court of Appeals likewise misconstrued the trust settlement in question in concluding that the decedent's power of appointment could have been relinquished and in failing to observe that the power was created for the benefit of the co-grantor beneficiaries of the trust and so required their consent to any relinquishment. The decision is consequently contrary to *Reinecke* v. *Northern Trust Company*, 278 U.S. 339.

Wherefore it is respectfully submitted that the petition should be granted.

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CHOATE, HALL & STEWART,
Of Counsel.

Dated at Boston, Massachusetts,
June 6, 1941.

Supreme Court of the United States.

OCTOBER TERM, 1940.

JOHN J. CHICKERING, ADMINISTRATOR,
Petitioner for Certiorari,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I. The decision cannot be reconciled with Helvering v. Helmholz.

The decision of the Circuit Court of Appeals was based wholly upon the proposition that the narrow special power which the decedent held was "a power . . . to alter" within the language of the Act. The power in question may best be described as a power of "disappointment." The limitations of the trust were that upon the death of the decedent the share of the corpus in which she had been beneficially interested should pass to her son, *unless* she should by deed direct that he should not receive it, in which event it was to go over to the other beneficiaries. This was the only power. Under it she might cut down or wholly cut off what her son should otherwise receive, but that was all. She could not direct how it should pass or apportion

it in any fashion among other beneficiaries. That was already taken care of by the trust indenture. It was, obviously, a special power.

The decedent in *Helvering* v. *Helmholz,* 296 U.S. 93, likewise had a special power which must as matter of law have had quite as great efficacy in subjecting the trust property to tax as Mrs. Chickering's power. But this Court there held that there could be no tax.

To discover the limitations of the Helmholz trust it is necessary to refer to the opinion of the Board of Tax Appeals (28 B.T.A. 165). It there appears that the trust provided:

> "Upon the death of any subscriber, to pay to such then living appointee or appointees as such deceased subscriber in and by last will and testament admitted to probate shall designate and appoint, the net dividends received in respect of the shares of stock by such subscriber transferred and assigned as aforesaid or such portion or portions thereof as such appointment shall direct. No appointment hereunder shall be effective for a longer period than the natural life of the appointee."

The decedent was a "subscriber." It was further provided that the subscriber's share should pass to her issue upon her death in default of appointment, or upon the termination of the life estate in the appointee in the event of appointment. In default of issue at either date the remainder went to the surviving subscribers and their issue. Thus Mrs. Helmholz had a special power to postpone her issue's taking through the interposition of a life estate.

Obviously if a power to cut off A so that the corpus may go to B (but not to C, D, or anyone else chosen

by the donee) constitutes a power to "alter, amend, or revoke," a power to postpone the vesting in possession of the corpus in A until the dropping of a life estate which may well last beyond A's own life must likewise constitute a power to "alter, amend, or revoke." Both beyond doubt are powers to vary the limitations of the settlement. But the decision of this Court in *Helvering* v. *Helmholz* establishes that the latter power does not suffice to subject the corpus to the estate tax. It must follow that the former power, which is the one with which we are here concerned, is likewise insufficient for that purpose.

It is true that the opinion of this Court in the *Helmholz* case does not discuss that power at all. But the point was nevertheless squarely presented and if the special power there held by the decedent had constituted a power to "alter, amend, or revoke" within the meaning of Section 302 (d) there could have been no occasion for the discussion of the power of termination which constituted the chief item of controversy. The case, therefore, is flat authority for the proposition that a power to interpose a life estate and so to postpone the vesting of a remainder does not constitute a power to "alter, amend, or revoke" under Section 302 (d). The remaindermen must have been living at the termination of the life estate created through exercise of the power in order to take. The exercise consequently might well result in the failure of one or more of the persons who would have taken at the death of the donee ever to take, for they might die before the life tenant. Death of the donee without appointment, therefore, would be quite as great assurance to them that they would take as it would be assurance to Mrs. Chickering's son in the instant case.

The Circuit Court of Appeals gave no extended discussion to its conclusion that the special power constituted the sort of power referred to in Section 302 (d). It said:

> "While the power retained by the decedent is phrased in terms of disinheritance, we can see no difference between this and a more conventionally phrased special power of appointment. As a practical matter Mrs. Chickering could choose between two possible objects—her son or the William A. Russell Trust—and could apportion the income and principal between them in any proportion she chose to the extent of complete exclusion of either. In cases involving equally narrow special powers, courts have frequently held that the enjoyment of the property in question was subject to a power in the transferor to 'alter, amend, or revoke' within the purview of §302 (d). *Commissioner* v. *Chase National Bank,* 82 F. (2d) 157, cert. denied, 299 U.S. 552; *Hoblitzelle* v. *United States,* 3 F. Supp. 331; *Holderness* v. *Commissioner,* 86 F. (2d) 137."

The three cases cited do not support this conclusion. In the *Hoblitzelle* case the power was very broad. It read:

> "'Section 11. The donor hereby reserves the right to change, alter, or amend the terms of this indenture at any time during her life, upon her written notice to the said trustees, and any and all such amendments shall be in writing, duly executed by the donor, and filed with the trustees: Provided, however, The donor shall not have the right to revoke and vacate this trust by any such amendment or alteration thereof.'" (3 F. Supp. 332.)

Obviously that was not an "equally narrow" special power. In the *Holderness* case the grantor had reserved three powers, one to withdraw $400,000, one to dispose of 25% of the corpus by will (a general power), and one to vary the beneficial interests of all beneficiaries. Patently the domination retained over that trust was very considerable. The narrow power in the case at bar is in no wise comparable. Finally, in the *Chase National Bank* case the court was careful to distinguish the *Helmholz* case. It said (82 F. (2d) at 158):

> "The distinction between this case and *Helvering* v. *Helmholz,* 296 U.S. 93, 56 S.Ct. 68, 80 L.Ed.—, and *White* v. *Poor,* 296 U.S. 98, 56 S. Ct. 66, 80 L. Ed.—, lies in the fact that in neither of them was there any power to alter, amend, or revoke within the meaning of section 302 (d)."

Thus it recognized that the power to postpone through the interposition of a life estate was not a power to "alter, amend, or revoke."

We submit that no sound distinction can be drawn between the power in the present case and that in the *Helmholz* case and consequently that the Circuit Court of Appeals has refused to follow the binding decision of this Court.

II. The Circuit Court of Appeals failed to apply the correct criteria with reference to the retroactive feature of the tax.

The focus of the opinion with reference to retroactivity appears at pages 101 and 102 of the record, where the court said:

> "It cannot be said that the tax here imposed is retroactive in any objectionable sense. While the

> trust was created in 1901, long before Congress had enacted an estate tax, the tax is an excise upon an event occurring subsequent to the enactment of the tax law. A similar argument about retroactivity was unsuccessfully made in *United States* v. *Jacobs*, 306 U. S. 363."

This represents a complete misconception of what Section 302 (d) is designed to do, and also a complete misunderstanding of the point we present.

The "event occurring subsequent to the enactment" is, of course, the death. But death alone does not subject all property formerly owned by the decedent to tax. For example, it never has been suggested that a trust settlement not made in contemplation of death and in which no power was reserved would be taxable. The tax accrues upon death, it is true, but it operates only upon the specific property designated by the several paragraphs of Section 302. Those several paragraphs proceed upon several different theories of jurisdiction to tax. The estate tax as a whole is a combination of several distinct kinds of taxes—death duties, transfer taxes, succession taxes, etc. Thus paragraphs (a) and (b) of Section 302 impose an excise upon death measured by the outright ownership of property. (Paragraph (b) is merely complementary to (a) to avoid subtraction of inchoate rights.) That is a death duty. Paragraph (c), the contemplation of death clause, clearly is a transfer tax. In order to prevent evasion of the death duty Congress taxes the transfer *inter vivos*. Although the tax accrues upon the death it is laid upon the transfer which preceded the death. Paragraph (e) is a death duty. It is in no way concerned with how the joint tenancy was created. No element of

transfer enters into the matter. The tax is laid upon death and is measured by the whole estate. Paragraph (f), the power of appointment clause, is a succession tax beyond question. See *Helvering* v. *Grinnell,* 294 U.S. 153. Paragraph (g), the insurance clause, is a death duty. In such a situation it is obvious that the criteria justifying the tax upon any particular piece of property will vary according to the nature of the tax.

Turning to paragraph (d) it is apparent that it, like paragraph (c), is a transfer tax. The first clause ("To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, . . . "), which defines the property which is to be taxed, is identical in both paragraphs. Unless there is a transfer before death neither paragraph can have any application. Only property so transferred is taxed under (d) and the tax clearly is a transfer tax. The theory on which the particular type of transfer in question is taxed is that it is an incomplete transfer, that the transferor through the device of a power has retained substantial dominion although he has parted with title. Unless such incomplete transfers are reached by the Act the tax could be evaded to a considerable extent.

But since the tax is a transfer tax it cannot apply where its effect would be retroactive. Unless the transfer is really incomplete (as in the case of a power to revoke) or unless after the passage of the Act the donee-transferor can destroy the power and make the transfer complete, the property is protected from tax by the Fifth Amendment.

Helvering v. *Helmholz,* 296 U.S. 93.
White v. *Poor,* 296 U.S. 98.

In the case at bar the transfer was not incomplete and the power was not destructible by the decedent in and after 1926.

The *Helmholz* case, for the reasons already pointed out, is conclusive that the existence of the power did not render the transfer incomplete. Moreover, apart from authority the same conclusion is apparent. This was not a simple power retained by a single grantor over property formerly owned by the grantor. The power was created by the joint act of six persons (the widow and five children of William A. Russell) and identical reciprocal powers in each of the other children were likewise created. Each grantor (if it be conceded for present purposes that the children could properly be termed grantors) became at the one time donee of the limited power and beneficially interested in the possible exercise of the other powers by the other donees. In effect, each said to each: "If you do nothing I am content that upon your death your share shall go to your issue, but I give you the power to cut off your issue. I do this in consideration of your giving me a similar power, and if you exercise the power I am to benefit by the exercise." That is not keeping such a string to property transferred as is contemplated by Section 302 (d). The transferor at whom Section 302 (d) is aimed is the person who retains substantial dominion. The reciprocal powers here involved certainly gave the donees no such thing.

If a donee exercises the power, whatever the others get from that donee's share must come to them not as *appointees* but as *owners* of the rights which they had created for themselves by the mutual covenants of 1901.

Yet the Circuit Court of Appeals has treated the case as though it involved simply a power reserved by a set-

tlor to appoint among two groups, (a) her own issue, (b) her brothers and sisters or their issue.

The Circuit Court of Appeals wholly failed to recognize that it was dealing with a transfer tax. This is apparent from the discussion of *United States* v. *Jacobs*, 306 U.S. 363. That case arose under Section 302 (e) which, as already shown, is in no way concerned with transfers. As this Court pointed out, that tax was in no sense retroactive and the taxpayer had wholly misconceived the basis of Section 302 (e) in his argument that it was retroactive. Here the tax is unquestionably laid upon a 1901 transfer and so equally unquestionably is retroactive.

Where a power is retained after the passage of the act, when it might be dropped, the retroactive feature of the tax is not within the denunciation of the Fifth Amendment. The cases in the Second Circuit establish this.

> *Porter* v. *Commissioner*, 60 F. (2d) 673.
> *Witherbee* v. *Commissioner*, 70 F. (2d) 696.
> *Commissioner* v. *Chase National Bank*, 82 F. (2d) 157.

All the Circuit Court of Appeals saw fit to say about this rule, hitherto unquestioned, was:

> "But the Supreme Court in affirming the Second Circuit in the *Porter* case made no mention of the releasability of the power as a vital factor in sustaining the tax. We doubt very much whether this makes any difference; it involves the questionable assumption that a person has a constitutional right to be afforded an alternative whereby a tax, otherwise unassailable, may be escaped."

But this Court in the *Jacobs* case recognized the rule which the court below characterized as a "questionable assumption." This Court said:

> "Until the death of her co-tenant, the wife could have severed the joint tenancy and thus have escaped the application of the estate tax of which she complains." (306 U.S. at 371.)

The whole theory of objectionable retroactive taxation is that it is unfair to tax a man for something which has been irrevocably done in the past. If he can undo that which has been done the unfairness disappears; but otherwise he has a constitutional right not to be taxed by reason of a situation which he cannot alter without agreement of adverse interests.

The conclusion of the court below that the power could have been freely released is manifestly erroneous. The opinion completely ignores the intricate interrelation between the reciprocal identical powers under the trust deed. The obvious intention was that all five children should be upon an equality. Each took the same immediate beneficial interest. Each received an identical power. Each had an identical, potential beneficial interest in the exercise of a power by each other. The balance was nicely calculated. That balance would have been destroyed by a release of the power by one. The release would have taken away the beneficial interest of each other grantor and could not, therefore, be accomplished without the consent of each. All joined in creating each power. All must likewise have joined in destroying any power. The attempted distinction of *In re Donne's Trusts*, L.R. 1 Ir. 516, is unsuccessful. Mrs. Chickering did not create the power. She joined in its

creation, but it stemmed quite as fully from her co-grantors as from her.

The interest of each as owner of the right to receive property cut off from the petitioner was adverse to Mrs. Chickering's renunciation of the right to cut him off. She had no right to withdraw her power from the scheme of the trust.

Conclusion.

We urge the Court to grant the writ in order to achieve uniformity on an important point—important both to the Treasury and to taxpayers. The opinion below fails to acknowledge the authority of this Court's decision and brushes aside a rule laid down in several cases by the Second Circuit. What transfers are taxable under Section 302 (d) was a troublesome question before the opinion of the court below was written. It now is far more troublesome and the doubts raised by that opinion should be dispelled by this Court.

Respectfully submitted,

FREDERICK H. NASH,
RICHARD WAIT.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	4
Argument	7
Conclusion	11

CITATIONS

Cases:

Burnet v. *Guggenheim*, 288 U. S. 280	11
Commissioner v. *Chase National Bank*, 82 F. (2d) 157, certiorari denied, 299 U. S. 552	8
Gwinn v. *Commissioner*, 287 U. S. 224	10
Helvering v. *Helmholz*, 296 U. S. 93	8, 9
Hoblitzelle v. *United States*, 3 F. Supp. 331	8
Holderness v. *Commissioner*, 86 F. (2d) 137	8
Porter v. *Commissioner*, 288 U. S. 436	8, 10
Reinecke v. *Northern Trust Co.*, 278 U. S. 339	10
Sanford, Estate of v. *Commissioner*, 308 U. S. 39	8, 10, 11
United States v. *Jacobs*, 306 U. S. 363	10

Statute:

Revenue Act of 1926, c. 27, 44 Stat. 9, Sec. 302 (U. S. C., Title 26, Sec. 411)	2

200439—41

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 153

JOHN J. CHICKERING, ADMINISTRATOR, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the Board of Tax Appeals (R. 82–87) is unreported. The opinion of the Circuit Court of Appeals (R. 97–107) is reported in 118 F. (2d) 254.

JURISDICTION

The decision of the Circuit Court of Appeals was entered on March 13, 1941 (R. 107). The petition for a writ of certiorari was filed on June 11, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The decedent and other members of her family created a family trust in 1901, providing that upon the death of the decedent, the income of her share was to go to her issue. Decedent, in common with other grantors, retained the power, exercisable by deed, (1) to create a life estate in favor of her husband in all or any part of the income; (2) to apportion income and corpus as she saw fit among her children, and (3) to disinherit her children wholly or partially in favor of the trust. Decedent died in 1935 leaving one child surviving her. The question is whether decedent's interest in the trust is includable in her gross estate under Section 302 (d) of the Revenue Act of 1926.

STATUTE INVOLVED

Revenue Act of 1926, Sec. 302, c. 27, 44 Stat. 9 (26 U. S. C. § 411):

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> (a) To the extent of the interest therein of the decedent at the time of his death;
>
> * * * * *
>
> (d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date

of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. The relinquishment of any such power, not admitted or shown to have been in contemplation of the decedent's death, made within two years prior to his death but after the enactment of this Act without such a consideration and affecting the interest or interests (whether arising from one or more transfers or the creation of one or more trusts) of any one beneficiary of a value or aggregate value, at the time of such death, in excess of $5,000, then, to the extent of such excess, such relinquishment or relinquishments shall be deemed and held to have been made in contemplation of death within the meaning of this title;

* * * * *

(h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and reliquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.

STATEMENT

The facts, which were stipulated (R. 74–81) and found by the Board as stipulated (R. 82), may be summarized as follows:

The decedent's father, William A. Russell, died intestate in 1899. He was survived by his widow and five children. Under the Massachusetts laws of intestacy the widow was entitled to 33⅓% of the estate and each child was entitled to 13⅓% of the estate. (R. 76–77.)

In 1901 the widow and children created the William A. Russell Trust and conveyed to it all of the property which they had inherited. The trust was to continue for 21 years after the death of the last survivor of a group which included all of the grantors, but it could be revoked or amended by the unanimous consent of all the surviving grantors and the eldest child of any deceased grantor. The trust deed was amended on a number of occasions but no amendment material for present purposes was made after 1918. (R. 76–77, 83.)

The deed of trust, as amended, provided that the widow should receive 20% of the income of the trust during her life but that she should have no interest in the principal. Upon her death, her share of the income was to be divided among the other beneficiaries of the trust. Each child was to receive 16% of the income for life. Upon the death of any child, the income from his or her

share was to go to his or her issue *per stirpes*, or, if there were no issue, the income was to go to the deceased child's spouse for life. Upon termination of the trust, the corpus was to be distributed among the persons receiving the income at that time in the same proportions in which they were receiving the income, unless their parents had provided otherwise. (R. 82–84.)

The trust deed, as amended, further provided that the decedent, in common with the other grantors of the trust except the widow, had the power (1) to create a life estate in favor of her husband in all or any part of the income, (2) to apportion income and corpus as she saw fit among her children, and (3) to disinherit her children wholly or partially in favor of the trust. By amendment in 1910, this power was made exercisable by deed alone. (R. 83–84, 32–34, 53.)

One of the decedent's brothers predeceased her, leaving a widow surviving him. The decedent's mother, William A. Russell's widow, also predeceased the decedent. Accordingly, at the time of the decedent's death in 1935, decedent was entitled to 21% of the income of the trust, instead of the 16% which she had originally received. She also had a remainder interest in her deceased brother's share after the life interest of his widow. (R. 77–78, 83.)

Decedent was survived by an adult son, but her husband had predeceased her (R. 74–75). Conse-

quently, at the time of her death her power over the devolution of her interest amounted to a power by deed to cut her son off from the whole or any part of her share of the income or principal. Any amount so cut off would automatically have been subject to distribution among the other beneficiaries in accordance with the other provisions of the trust deed. Decedent never exercised this power, however, so her entire beneficial interest passed to her son (R. 84).

In computing decedent's estate tax, the Commissioner included in her gross estate an amount representing the value of 21% of the corpus of the trust at the date of the decedent's death, and another amount representing the value at that time of decedent's remainder interest in her deceased brother's share of the trust (R. 75, 84). Petitioner filed a petition for review with the Board of Tax Appeals, contending that nothing should be included in the gross estate on account of decedent's interest in the trust, and, in the alternative, that if any amount should be included, it should be no more than 13⅓% of the corpus of the trust, the percentage which decedent originally transferred in trust (R. 84). The Board of Tax Appeals held that the value of 13⅓% of the corpus of the trust was includable in the gross estate and determined a deficiency of $125,856.69 accordingly (R. 87). Upon appeal by the taxpayer, the court below affirmed (R. 107).

ARGUMENT

1. The decision below is manifestly correct and accords with the decisions of this Court and of other circuit courts of appeals.

The trust indenture provided that decedent should have power to create a life estate in favor of her husband in all or any part of the income, to apportion income and corpus as she saw fit among her children, and to disinherit her children wholly or partially in favor of the trust. Since only a son survived her, the power to create a life estate in favor of the husband and to apportion income or corpus among the children was of no practical value to decedent at the time of her death. She did, however, have the power to cut off her son entirely or to leave him any portion she saw fit of her share of the trust corpus and income. This, of course, gave her power to effect a complete change in the devolution of her share of the trust property by giving it, in whole or in part, to the other beneficiaries of the trust rather than to her son.

The retention of such a power brings the trust within the clear language of Section 302 (d) of the Revenue Act of 1926, which requires merely that the enjoyment of the trust property be subject at the date of "death to *any* change through the exercise of a power, either by the decedent alone or in conjunction with any other person, to alter, amend, or revoke * * *." [Italics supplied.] It is

immaterial that the decedent could not exercise the power in her own favor. *Porter* v. *Commissioner*, 288 U. S. 436; *Commissioner* v. *Chase National Bank*, 82 F. (2d) 157 (C. C. A. 2d), certiorari denied, 299 U. S. 552; cf. *Estate of Sanford* v. *Commissioner*, 308 U. S. 39, 42. Nor does Section 302 (d) contain any requirement that the class of persons for whose benefit changes may be made shall be unrestricted. It is sufficient that the devolution of the property be subject to substantial modification. *Commissioner* v. *Chase National Bank, supra; Holderness* v. *Commissioner*, 86 F. (2d) 137 (C. C. A. 4th); see *Hoblitzelle* v. *United States*, 3 F. Supp. 331, 333–334 (Ct. Cls.).

The decision below is in full accord with the decision of the Circuit Court of Appeals for the Second Circuit in *Commissioner* v. *Chase National Bank*, 82 F. (2d) 157, where it was held that the retention of a power to alter the proportions in which the decedent's three children would take the trust property was sufficient to bring the trust within the provisions of Section 302 (d). A petition for certiorari filed by the taxpayer in the *Chase National Bank* case was denied by this Court (299 U. S. 552); every reason which led to the denial of the writ in that case seems equally applicable here.

2. There is not, as alleged by petitioner (Pet. 6), a conflict with *Helvering* v. *Helmholz*, 296 U. S. 93. There the decedent had made a transfer in trust,

naming herself as one of the beneficiaries and reserving to herself, as a beneficiary, the right to join with all the other beneficiaries in terminating the trust. This Court held that such a power was not to be considered as a power to "alter, amend, or revoke" the trust within the meaning of Section 302 (d). Plainly, that holding is not opposed to the conclusion of the court below, for, to the extent that the right to recall in that case was conditioned upon the consent of all the beneficiaries, the transfer was in effect an absolute one.

Petitioner refers (Pet. 10) to the fact that the trust deed involved in the *Helmholz* case gave the decedent a right to create a life interest in the income of the trust property through appointment by will. The petition points out that, although the decedent in the *Helmholz* case did appoint to her husband for life and thus did to a limited extent change the devolution of the property, this Court held that none of the trust property was includable in her gross estate. However, as shown by the opinion of the Court of Appeals for the District of Columbia (*Helvering* v. *Helmholz*, 75 F. (2d) 245 at 248), the Commissioner did not appeal the Board's holding that the life interest in the income of the trust estate appointed to the husband should not be included in the decedent's gross estate, and examination of the briefs filed in this Court shows that no argument was made here that either the existence or exercise of the power of appointment

brought the trust property within Section 302 (d). The holding in that case must be confined, therefore, to the issue actually decided, namely, that the power of a grantor, who is also a beneficiary, to join with the other beneficiaries in terminating the trust is not a power to "alter, amend, or revoke" the trust within the meaning of Section 302 (d). Moreover, these additional facts with respect to the *Helmholz* case were called to this Court's attention in the petition for certiorari in the *Chase Bank* case, *supra,* and certiorari was denied.

3. Petitioner urges that Section 302 (d) would be unconstitutional because of retroactivity if applied to the present trust, which was created in 1901. But the decedent retained control over the devolution of the property up to the time of her death, which occurred after the enactment of the statute. The termination of that power upon her death for the first time assured her son that he would succeed to decedent's share of the trust. In these circumstances, the statute does not have retroactive application. Cf. *Porter* v. *Commissioner,* 288 U. S. 436; *Estate of Sanford* v. *Commissioner,* 308 U. S. 39, 43; *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, 345; *Gwinn* v. *Commissioner,* 287 U. S. 224. As this Court has said, a "tax does not operate retroactively merely because some of the facts or conditions upon which its application depends came into being prior to the enactment of the tax." *United States* v. *Jacobs,* 306 U. S. 363, 367.

Petitioner is in error in asserting that the decedent could not have relinquished the power reserved to her. She did not hold this power in trust, and a relinquishment would not have amounted to an amendment of the trust or have required any act beyond the powers which she could exercise. The generally accepted rule that a grantor may relinquish powers reserved in a trust instrument during life as well as at death is obviously the premise on which the decisions in *Estate of Sanford* v. *Commissioner, supra,* and *Burnet* v. *Guggenheim,* 288 U. S. 280, are based.

CONCLUSION

There is no conflict in the decisions and no novel question is involved. The decision of the lower court is manifestly correct. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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